BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT AND CONDITIONAL USE PERMIT ISSUED BY SKAGIT COUNTY TO SKAGIT COUNTY ENGINEERING DEPARTMENT SKAGIT COUNTY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	SHB No. 78-1 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of a denial of a conditional use permit by the Department of Ecology, came before the Shorelines Hearings Board, Dave J. Mooney, Chairman, Chris Smith, Robert F. Hintz, and Gerald D. Probst at a hearing in Mount Vernon (April 6 and 7, 1978) and in Seattle (April 21 and May 12, 1978). David Akana presided.

Appellant was represented by its attorneys, William Nielsen and Glenn Reed; respondent was represented by Robert V. Jensen, Assistant

Attorney General.

The Board viewed the site. Witnesses were sworn; exhibits admitted.

Having heard or read the testimony, having examined the exhibits and having considered the contentions of the parties, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

Big Lake is a shallow (14 feet average depth), three mile long by one-half mile wide body of water located approximately five miles southeast of Mount Vernon in Skagit County. A great majority of the uplands of Big Lake is in private ownership and platted for residential us for over fifty years. Permanent population in the vinicity is approximat 600 and swells to over 1,000 in the summer. Residents and the general public use the waters of the lake for a variety of recreational pursuits, including fishing, swimming, boating, and water skiing.

Big Lake is principally fed by Lake Creek which is in turn connected to Lake McMurray, a 158-acre lake, located four miles upstream and to the south of Big Lake. Big Lake drains in a northerly direction into Nookachamps Creek, and then into the Skagit River.

II

Big Lake supports several species of fish, including yellow perch, large and small mouth bass, crappies, brown bullhead, rainbow trout and cutthroat trout. The Department of Game annually stocks the lake with 40,000 fingerling rainbow trout.

Nookachamps Creek supports several fish species, including rainbow trout, steelhead trout, cutthroat trout, coho salmon, yellow perch,

and large mouth bass. Presently, flooding, low flows and poor water quality inhibit anadromous and resident fish production therein.

III

Water quality problems in the lake, notably high coliform counts, have prompted the development of a sewer plan and district for Big Lake. Skagit County Sewer District No. 2 has within its boundaries 285 residential structures and an additional 291 lots which are available under present plats. A proposed sewerage plan, costing about $2,900,000, was approved in 1977 and design thereof is 30% completed. The Department of Ecology optimistically estimates that construction of the sewer may begin in late summer or fall of 1978. The construction of a sewer will help improve the water quality of the lake and will reduce the risk of septic system inundation in low-lying areas. The proposed substantial development will have no appreciable impact on the water quality of the lake.

IV

The Skagit County Shoreline Master Program (hereinafter "master program") was adopted by the County and approved by the Department of Ecology prior to permit issuance. Therein, the shoreline of Big Lake has been designated "rural residential" in its master program except for a portion of the south end of the lake which has been designated "conservancy." Nookachamps Creek, in which the proposed substantial development would be placed, lies in an "aquatic" environment designation.

V

In August, 1975, land owners petitioned the Board of County Commissioners requesting that a sub-flood control zone around Big

Lake be established to control fluctuations of the lake level. In January, 1976, a sub-flood control district was established. To meet the purposes for which the district was formed, the county engineers designed the instant project.

VI

The proposed development is the construction and operation of a 74 foot wide by 12 foot high concrete structure with six adjustable steel gates 100 feet downstream of the outlet of Big Lake and in the channel of Nookachamps Creek. Approximately 750 feet of the channel w be affected: 200 feet of the channel is to be widened requiring the removal of 2700 cubic yards of material; an existing log in the creek be removed. A foot bridge located on the structure will afford pedest access over the creek. The steel gates can permit a maximum water flo 1500 cubic feet per second. The proposed improvements will allow the passage of a 25-year frequency flood and will cost an estimated $54,00 The stated purposes of the proposed development are to reduce damage t docks and structures on the shoreline by limiting present lake water l fluctuations of five to six feet to an anticipated two to three feet; reduce erosion of the shoreline banks; provide for increased recreatio opportunities on the lake during summer and early fall by maintaining higher water level.

The county issued a substantial development and conditional use permit to its engineering department for the proposed structure. The terms of the permit require that the county engineer receive approval for its operating procedures from appropriate fisheries management agencies and that a low-flow level in the creek be established by agreement with the appropriate state agency. The state departments of

fisheries and game oppose the project as submitted and continue to do so. Consequently, appellant has not received any such approval or agreement.

VII

The Departments of Game and Fisheries opposed the proposed development because they believed that extremely high and extremely low flows in Nookachamps Creek would result therefrom. The high flows would wash fish eggs from the gravel and destroy spawning habitat. Low flows would leave eggs or fry stranded without water. The excessive run-off into Nookachamps Creek caused by the structure would require stream widening and dredging which would be detrimental to fish species and would be aesthetically unacceptable. Additionally, the lower lake levels would reduce the spawning habitat for spiny ray species, and if lowered after spawning, would result in loss of eggs. In accordance with such views, the departments denied appellant's hydraulics project application. Witnesses from the departments now urge the denial of the conditional use permit on similar grounds.

VIII

No determination or analysis of water entering and leaving the lake or of the storage capacity of the lake was made. Such determination is necessary to properly design a structure for flood control. More importantly, the concept of flood control should be viewed from the standpoint of the management of an entire watershed area, and should not be limited to one lake in a river system, as is the case here.

IX

The structure is not designed to store water. Consequently expectations of higher water levels during summer months will not be realized. Presently, the existing log dam, a single log athwart the stream acts as a minimal barrier to water outflow, but allows seepage at all times. Respondent is of the opinion that removal of the log dam would not result in any significant difference in lake level.

X

Flooding in Big Lake results in water inundation of beaches, lawns, walkways, and some septic systems. Docks and retaining walls have sustained some damage from flooding over the years. There is, however, no danger to life or limb from the flooding occurring on this lake. The average damage on an annualized basis for a fifty year flood is liberally estimated at $26,300.

XI

Presently there is not enough available data to establish low flow for the Nookachamps Creek, and thus no flow level has been, or can now be determined. However, placement of a bypass or notch in the proposed structure which would pass an equivalent amount of water that is now being passed, could be achieved. Provision for fish passage should be, but is not, adequately provided in the proposed structure.

XII

The Department of Fisheries' experience with the type of flood control structure here proposed has made very clear the necessity of an effective, comprehensive operation plan. Improper operation

could result in higher instantaneous flow when water is released in anticipation of a flood, and lower low flows if insufficient water is available. Fish, such as coho and steelhead, may be drawn upstream during the spawning season by the higher flows from the release of water and left high and dry if the water is shut off after a predicted rainfall does not materialize. Summer low-flow levels correlate with coho spawning runs. Lower flows resulting from insufficient water storage could produce low spawning runs. A higher average flow during periods of low flow could, on the other hand, enhance the runs.

XIII

The county has no comprehensive plan of operation for the structure which would reasonably insure that the natural resources depending on the lake and adjoining river system would be preserved. Although there are no homes downstream which would be impacted by the release of water before a predicted flood, the higher water downstream may create adverse results described in Finding of Facts VII, XII, and XVIII.

XIV

Including recreational and commercial fishing, the estimated value of fish in Big Lake is $155,000 per year; the value of fish in Nookachamps Creek is estimated to exceed $300,000 each year. Of these figures, $124,000 per year can be attributed to coho salmon in the Nookachamps Creek system, which includes Big Lake.

XV

Water elevation devices are available which could control the

lake level in a manner superior to manual operation. Such devices are prohibitively expensive for a project such as the instant one and, in spite of the expense, will not be correct all of the time.

XVI

Alternatively, a structure designed simply to replace the log barrier, and with no control gates, would be preferable to the proposed structure. Such a concept, if an acceptable low flow were established, would not pose a problem to the salmon resource in the river system. Such "concrete log" would be wider than the existing log and would require substantial channel modification downstream. This concept would not control floods, however, which is the primary purpose of the instant development.

XVII

Erosion immediately downstream of the project and on nearby banks is likely. If the proposed development were to be constructed, riprap would be required to control erosion and to prevent movement of materials downstream in order to avoid loss of fish from siltation of water.

XVIII

A reduction in the lake level may cause the loss of a part of the highly productive littoral area of the lake. The marsh at the south end of Big Lake supports a limited and declining summer habitat area for a variety of birds, mammals, trees, vegetation, and other organisms in western Washington. The marsh also acts as a natural treatment system for organic wastes in waters entering the lake.

The Department of Game's concern with the instant development

is the reduction of the peak water levels in the lake, which are those same peaks the county seeks to remove to prevent higher water along the shorelines of the lake. Removal of the peak levels, or the maintaining of a constant level, could affect the variety of trees and vegetation of the marsh. Even left alone, however, this marsh will naturally, and eventually, change. Today, the lake is mildly eutrophic.

XIX

The master program provides that the proposed use is permitted as a conditional use in a rural residential and aquatic environment.[1]

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1. Section 7.16 of the master program provides in part:

2.A.(2) Rural Residential

a. Shoreline stabilization and flood protection measures are permitted subject to the General Regulations.
b. Channel modifications and dams and impoundments are a conditional use.

. . .

2.A.(6) Aquatic

a. Shoreline stabilization and flood protection measures are permitted only as a conditional use.
b. Dams and impoundments are permitted as a conditional use only if compatible with the upland Shoreline Area regulations.
c. Current deflectors are permitted as a conditional use.

. . .

2.B.(8) Dams and impoundments - Dams and impoundments shall be subject to applicable Shoreline Area regulations.

. . . .

See Page 7-2 of the master program. However, it has not been shown by appellant that the proposed substantial development meets the applicable general regulations at issue:

A. Section 7.16.2B(2)

> Qualifications for approval - Shoreline stabilization and flood protection measures shall be allowed only when adequate evidence is presented that one of the following conditions exist:
>
> . . .
>
> c. High water or significant erosion damages or threatens existing homes and residential areas.
>
> . . . .

The preponderance of the evidence shows that high water or erosion does not present a threat to existing homes and residential areas. Septic drainfield inundation on low-lying areas is the most serious threat, but such threat should be removed by the planned Black Lake sewer system.

B. 7.16.2B(5)

> . . .
> d. All works shall be designed and constructed to meet the requirements and standards of the County Engineer, State Departments of Fisheries and/or Game, Corps of Engineers where applicable, and Soil Conservation Service.

Testimony from respondent's witnesses indicates that no U.S. Corps of Engineers' requirements apply to the structure. Foundation, soils, concrete, and seepage analysis would also be required but have not been made or required as a condition of the permit. Finally, there is no hydraulics permit for the project, nor is the permit conditioned upon the receipt of such.

C. Section 7.16.2B(7)

> Estuaries and wetlands - Any proposal to dike, drain, or fill tidelands, estuaries, salt marshes, and associated water bodies and wetlands shall provide a thorough evaluation of the natural productivity of the wetlands to be displaced and the proposed use.

Expert testimony differs as to whether there would be any effect upon the marsh at the southern end of Big Lake from the construction and operation of the proposed structure. Respondent raises concerns, unanswered by appellant, regarding the effect of the attenuation of peak water levels in the lake. Because such concern was not thoroughly evaluated, the proposed substantial development is inconsistent with the foregoing provision.

D. Section 7.16.1A(2)

> Recognizing that streamway modifications may cause interference with normal river geo-hydraulic processes that may lead to erosion of other up and down river shorelines, then such modifications and stabilization measures should incorporate basic geo-hydraulic principles and be located, designed, coordinated, and maintained for homogeneous river reaches.

Erosion of other areas of the river shorelines will not be caused by the proposed development, and the development is consistent with the above provision of the master program.

XX

Although Section 6.04(6)(d)(3) of the master program requires that "primary consideration" be given to the protection of the natural resources, it is clear that an important fisheries resource will be placed at risk upon the construction and operation of a structure whose design and operation is not yet fully formulated. Also at risk is the

marshland in Big Lake for which the effect from the operation of the structure has not been thoroughly evaluated. The effect upon such resources has not been shown to require less than "primary consideration" given the purposes of the structure, i.e., flood control and lake level setting. Moreover, because of its potential impact upon the fisheries and marshland, with no overriding public, or even private, benefit conferred, this project should be assigned very low priority among those permitted activities, not the least of which is recreation, in the shoreline area. The substantial development is therefore inconsistent with Section 6.04(6)(d)(7) of the master program.

XXI

The proposed substantial development could destroy natural habitats and detrimentally impact fisheries. No significant public benefit would accrue from the risk of such loss of natural resources.

XXII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

RCW 90.58.100(5) requires that a master program provide flexibility from its provisions under certain circumstances:

> . . .
> Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in

RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.140(3).

The conditional use concept is contained in the Department of Ecology rule, WAC 173-14-140:

> . . .
> Conditional uses are specifically described within the master program. The objective of a conditional use provision is to provide more control and flexibility for implementing the regulations of the master program. With provisions to control the undesirable effects, the range of uses within each of the designated environments can be expanded to include additional uses.

The foregoing statutory provision and regulation have been implemented in the shoreline master program. See Chapter 11 (Conditional Uses) of the master program. Therein, Section 11.03 requires that the following criteria are met:

a. The proposed use or development must meet applicable regulations and/or performance standards contained in this program that will assure compatibility with other uses permitted in the specific Shoreline Area; and

b. The use or development will not cause unreasonably adverse impacts on shoreline features or environmental quality; and

c. The use or development will not unnecessarily nor substantially interfere with lawful public use of public shorelines; and

d. Visual appearance of the development will be compatible with adjoining shoreline features and intent of the site's Shoreline Area designation; and

e. The development will be consistent with the general intent of this program.

The "general intent of this program" includes the following provision:

> . . .
> This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.
> . . .
> To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment or are unique to or dependent upon use of the state's shoreline. . . .
>
> Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.
> . . .

The common difficulties of the proposed substantial development and the applicable criteria under Section 11.03 (a, b, c, and e) are the unreasonable potential adverse impacts which threaten the marsh and fisheries resource and which would unnecessarily and substantially interfere with the public use of the shoreline. These detrimental aspects are the result of an inadequate plan of operation for the structure. Much is placed at risk for a small, and perhaps questionable, corresponding benefit. Moreover, the proposed substantial development is not consistent with Section 7.16.2B(2), (5), and (7) and Section 6.04 (6)(d) (3) and (7) of the master program, and therefore cannot be considered to be compatible with other permitted uses in the area.

Appellant has failed to persuade us that the denial of the conditional use permit should be reversed, and accordingly, the Department of Ecology's action should be affirmed.

II

In view of our disposition of this matter, we do not comment upon respondent's contentions under chapter 90.22 RCW, chapter 90.24 RCW and chapter 90.54 RCW.

III

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The denial of the conditional use permit is affirmed.

DATED this 28th day of June, 1978.

SHORELINES HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member

ROBERT F. HINTZ, Member

GERALD D. PROBST, Member